BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

258434

In the Matter of:
CUSTOM BUS CHARTER, INC.
Respondent.

Docket No. FMCSA-2000-8158-3
(Southern Service Center)

FINAL ORDER

This matter comes before me upon an October 19, 2000 Motion For Final Order filed by the State Director, Louisiana Division, Federal Motor Carrier Safety Administration (FMCSA).[1]

1. ***Background***

On July 9, 1999, the Operations Manager for the Southern Resource Center, Office of Motor Carriers, Federal Highway Administration[2] issued a Notice of Claim against Custom Bus Charter, Inc. (Custom or Respondent).[3] The Notice of Claim charged Respondent with one violation of 49 CFR 382.413(b)—using a driver to perform a safety sensitive function without having obtained the information required in 49 CFR

[1] State Directors are now called Division Administrators.

[2] This position is now the Field Administrator, Southern Service Center, FMCSA.

[3] Exhibit A to the Motion For Final Order.

382.413(a).[4] This violation was discovered following an investigation into a May 9, 1999 crash of a Custom bus that resulted in 22 fatalities. The Notice of Claim alleged that Custom failed to request the necessary drug and alcohol testing information from previous employers when it hired Frank Bedell, the driver of the bus, in May 1997. A civil penalty of $10,000 was assessed.

Custom replied to the Notice of Claim on August 4, 1999 and requested an oral hearing.[5] It denied committing the alleged violation and claimed that it contacted Mr. Bedell's previous employers before using him. In support of this allegation, it attached copies of two information request forms sent to Hertz Car Rental and Turner Bus Service.[6] However, the form sent to Hertz was undated, and the form sent to Turner indicates that Mr. Bedell authorized the release of information to Respondent on January 12, 1998, eight months after he was hired by Custom.

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[4] When the Notice of Claim was issued in 1999, § 382.413(a) required prospective employers to request from a driver's previous employers information regarding: (1) alcohol tests with a result of 0.04 alcohol concentration or greater; (2) verified positive controlled substances test results; and (3) refusals to be tested. Under § 382.413(b), the new employer had to obtain and review this information before allowing the driver to perform safety sensitive functions, if feasible. An employer who fails to make a good faith effort to obtain the required information may not use a driver after 14 days from the time it first used the driver. In 2001, the requirements of former § 382.413, with some modifications, were recodified at 49 CFR 40.25 and are now incorporated by reference by the current § 382.413.

[5] Exhibit B to the Motion For Final Order. In addition to requesting an oral hearing, Respondent stated "it further gives notice of its intent to submit further evidence and to supplement and/or amend this reply and response." It failed to submit any additional evidence.

[6] These forms specified they were requesting information required by 49 CFR 391.23, i.e., information pertaining to Mr. Bedell's driving record and employment record during the preceding three years.

In his Motion For Final Order, the State Director provided a copy of Mr. Bedell's employment application, which listed four previous employers, three of which were transportation-related.[7] He also provided a copy of a blank form from Respondent's files specifically used to request the information required by 49 CFR 382.413(a).[8] According to a Report of Interview prepared by FMCSA Motor Carrier Safety Specialist Paul T. Henderson,[9] Respondent's Safety Director was unable to find any evidence in the carrier's files that it requested drug and alcohol testing results from Mr. Bedell's previous employers.[10] Reports of Interview with Hertz and Turner officials confirmed that they were not contacted for this purpose.[11]

Based on the above, the Field Administrator argued that there were no genuine material issues of fact warranting an oral hearing and that the evidence established that Custom used Mr. Bedell as a driver after failing to make a good faith effort to obtain the required drug and alcohol testing information. He argued that: (1) the forms submitted by Custom with its reply to the Notice of Claim did not solicit the information required by § 382.413; and (2) there was no evidence that these forms were even sent or received. The State Director contended that the $10,000 penalty was proper and supported by the

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[7] Exhibit D to the Motion For Final Order, page 5. In addition to Hertz and Turner, Mr. Bedell indicated he had worked for Lassair Bus Service, which was apparently out of business at the time he submitted the application.

[8] Id., at 10.

[9] Mr. Henderson also submitted a sworn Declaration identifying the source of the documentary evidence submitted by the State Director, as required by 49 CFR 386.49. See Exhibit E to the Motion For Final Order.

[10] Exhibit D to the Motion For Final Order, page 13.

[11] Id., at 11-12.

evidence and the nine statutory assessment factors in 49 U.S.C. § 521.[12] However, no evidence regarding penalty calculation, such as a Uniform Fine Assessment (UFA) worksheet or similar document, was submitted with the Motion For Final Order.[13] Custom did not respond to the Motion For Final Order.[14]

2. *Decision*

Based upon the record before me, I find that this matter is ripe for decision. A motion for final order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.[15] All inferences must be drawn in favor of the non-moving party, Custom in this case.

A. *Request for Hearing*

The Rules of Practice require, at 49 CFR 386.14(b)(2), that a request for hearing list all material facts believed to be in dispute and further require, at 49 CFR 386.16(b), that the Assistant Administrator determine whether there are any material facts in dispute before calling the case for a hearing. Although Respondent's reply to the Notice of

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[12] These factors include the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other factors as justice and public safety may require. See 49 U.S.C. § 521(b)(2)(D).

[13] The UFA is software designed to implement a uniform and fair application of penalties by devising a formula for determining the penalty based on consideration of the specific statutory factors referenced in footnote 12.

[14] In addition to failing to respond to the Motion For Final Order after it was originally served in October 2000, Custom did not respond to my August 12, 2003 Order giving it another opportunity to file a response.

[15] See *In re Forsyth Milk Hauling Co., Inc.,* Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, March 31, 1993 (Order, December 5, 1991).

Claim complied with section 386.14(b), it still had the burden of establishing a material factual dispute.[16] Custom's allegation that it complied with § 382.413 was based on two undated forms requesting information required by 49 CFR 391.23. Even if these forms had been sent within 14 days after first using Mr. Bedell, Respondent would not have complied with § 382.413. Accordingly, I find there is no material fact in dispute and Respondent's request for oral hearing is denied.

B. Motion for Final Order

Notwithstanding Respondent's failure to show any material facts in dispute, the State Director must establish a *prima facie* case, i.e., he must present evidence clearly establishing all essential elements of his claim, before I can grant his Motion For Final Order.[17] If the State Director makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the State Director's motion will be granted.[18]

The evidence establishes that Respondent did not request drug and alcohol testing information from Mr. Bedell's previous employers when it hired him in May 1997. Therefore, I find that the State Director made a *prima* facie case that Custom violated 49 CFR 382.413(b) by using Mr. Bedell to drive a bus in May 1999 and that Respondent failed to rebut the State Director's *prima facie* case.

However, I also find that the State Director failed to meet his burden of showing that he adequately considered the statutory assessment factors in determining the

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[16] *In the Matter of American Diversified Construction, Inc.,* Docket No. 90-TN-043-SA, 58 Fed. Reg. 16951, at 16952, March 31, 1993 (Final Order, May 12, 1992).

[17] *In the Matter of Forsythe Milk Hauling Co., Inc.,* supra.

[18] *Id.*

penalty.[19] Although the State Director imposed the maximum penalty for a non-record keeping violation, I note that the violation involved is not considered sufficiently serious to be an acute or critical regulation for purposes of assigning a safety rating.[20] Furthermore, the evidence regarding Respondent's past compliance history did not show significant previous noncompliance.[21] It appears, therefore, that the primary basis for applying the maximum penalty was the driver's involvement in a fatal accident, as is evidenced by the following statement on page 6 of the Motion For Final Order:

> "The extreme gravity of the violation, or probability of causing injury or death in this case, is evident in the fatal crash involving Mr. Bedell. Dispatching a newly-hired driver without obtaining information on drug and alcohol testing history greatly increases the potential for a driver's substance abuse problems to evade detection. The consequence of allowing drivers with drugs in their systems to drive is grave danger to the safety of the public. Preventing crashes resulting from illegally drugged drivers is the very reason for the existence of the drug testing regulations....Custom's culpability lies in its negligent failure to check on the testing history of its drivers before using them to drive. The serious and negative safety consequences of Custom's violation were taken into account in assessment of the penalty."

This argument is not persuasive and does not support assessment of the maximum penalty in this case because the State Director failed to show that the violation was in any

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[19] Although the State Director argued that Custom did not contest the appropriateness of the penalty amount, this does not relieve him of the initial burden of showing that the statutory penalty factors, including ability to pay, were properly taken into account. *See In the Matter of Clorinda A. Gehouskey dba Rainbow Charter Service*, Docket No. FMCSA-2002-11730, Final Order, October 14, 2003, at 5-6.

[20] *See* Appendix B to 49 CFR part 385. Noncompliance with acute regulations requires immediate corrective action, while violations of critical regulations are considered indicative of breakdowns in a carrier's safety management controls. *See* Appendix A to 49 CFR part 385, III.

[21] The State Director submitted a SafeStat printout showing one closed enforcement action involving two false log violations that was settled for $880 in June 1998. *See* Exhibit F to the Motion For Final Order.

way connected to the May 1999 crash. He presented no evidence that full compliance with § 386.413 would have disclosed any adverse information regarding Mr. Bedell's drug and alcohol testing history.[22] Furthermore, there was no evidence that Mr. Bedell tested positive for drugs or alcohol following the crash. Aside from the disproportionate weight given to the May 1999 crash, there is no evidence that the State Director even considered Respondent's ability to pay and the effect on its ability to remain in business in calculating the penalty. In fact, he submitted no evidence regarding the penalty calculation. Without such evidence, his statement that the statutory factors were properly considered is nothing more than an unproven allegation and I cannot determine whether, in fact, the State Director adequately considered the statutory factors in assessing this particular amount. Therefore, I find that the State Director failed to meet his burden of justifying the amount of the penalty assessed in this matter. As there is insufficient evidence to justify the penalty, no penalty will be assessed.

Based on the above, I conclude that the Field Administrator made a *prima facie* case establishing the violation and that Respondent failed to rebut the Field Administrator's *prima facie* case. The Motion For Final Order is granted, except as indicated above regarding the penalty.[23]

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[22] Safety Specialist Henderson, who interviewed officials of both previous employers, could have readily determined Mr. Bedell's testing history but either did not take advantage of that opportunity or received no adverse information.

[23] Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

It Is So Ordered.

John W. Hill
Chief Safety Officer
Federal Motor Carrier Safety Administration

10-30-03
Date

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of November 2003, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Dennis P. Ganucheau Custom Bus Charter, Inc. 200 C Wright Avenue Gretna, Louisiana 70056	One Copy U.S. Mail
Jerry Cooper, Field Administrator Federal Motor Carrier Safety Administration 61 Forsyth St., SW, Room 17T75 Atlanta, GA 30303	One Copy U.S. Mail
DaVina Farmer, Esq. Federal Motor Carrier Safety Administration 61 Forsyth Street, S.W. Suite 17T75 Atlanta, GA 30303	One Copy U.S. Mail
U.S. DOT Dockets U.S. Department of Transportation 400 Seventh St., S.W., Room PL-401 Washington D.C. 20590	Original Personal Delivery